No. 80-1677

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CHRISTOPHER GREGORY,

Petitioner,

—v.—

MARK WHITE, ATTORNEY GENERAL OF THE STATE OF TEXAS, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BRIEF OF RESPONDENTS MARK WHITE, ATTORNEY GENERAL OF THE STATE OF TEXAS, THOMAS M. DOYLE, JOHN J. MEEHAN AND J. PETER GRACE IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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May 7, 1981

Counter-Statement of the Questions Presented

The questions presented, as stated by petitioner, were not raised, ruled on or relevant in the courts below. They have as their premise the unfounded assertion that the Texas courts relied on an ecclesiastical power of attorney in entering a judgment based on a settlement agreement. Instead, in affirming the judgment of the district court, the court of civil appeals found that petitioner personally and unconditionally signed the settlement and agreed form of judgment and did not communicate to his attorneys, any of the parties, or the trial judge any mental reservation he might have had concerning the consent judgment prior to its rendition (A-37).*

A question preliminary to those raised by petitioner must be:

Is there any substantial federal question presented by the judgment below, or is it based wholly on state-law grounds?

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* The appendix to the petition is abbreviated throughout this brief as "A- ".

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Opinions Below

The judgment of the Supreme Court of Texas refusing petitioner's application for a writ of error, which was without opinion and is not reported, is set forth at A-47. The opinion of the Texas Court of Civil Appeals is reported at 604 S.W.2d 402 (Tex.Civ.App.—San Antonio 1980, writ ref'd n.r.e.) (A-34-38). The judgment of the trial court was rendered without opinion (A-24-33).

Counter-Statement of the Case

Early history of this case

Mrs. Sarita Kenedy East died in Texas in 1961 after willing most of her estate to a charitable foundation, The John G. and Marie Stella Kenedy Memorial Foundation ("KMF"). During the past twenty years, her charitable testamentary wishes have been frustrated by judicial proceedings—with the instant petition being the last.

This proceeding was commenced in 1961 with the filing of a petition and application for injunction in the Texas trial court by Lee H. Lytton, Jr., who sought a declaratory judgment that certain defendants (including petitioner Gregory) were not validly appointed as directors, officers and members of KMF and that he and Jacob Floyd were the only duly elected and appointed representatives of KMF, as well as an injunction against defendants acting in those capacities. Following extended negotiations, all parties to the suit reached a settlement which provided for the election of new members and officers of KMF, for revision of KMF's charter and bylaws to settle qualifications for membership and guidelines for charitable giving, and for a division of Mrs. East's residuary estate between KMF and Sarita Kenedy East Foundation, Inc. ("SKEF"), another charitable foundation.

Both the settlement agreement and a proposed judgment incorporating its terms (A-1-23) were executed by all parties (including Gregory, who signed in both his individual and religious capacities, A-8, and the Attorney General of Texas, by law a necessary party to the proceeding, A-9), and were submitted to the district court for approval. After a hearing on September 1, 1964, at which all parties appeared in open court in person or by their attorneys, the court, after careful consideration, and upon the recommendation of the Attorney General, approved the settlement and entered a judgment dismissing all claims made in this action "with prejudice" as against all defendants including Gregory (A-2, A-6).

The parties had intended that judgment be final in all respects. Certain of Mrs. East's heirs at law (none of whom were parties herein), however, had brought a suit contesting the validity of her will, and a temporary administrator of the estate had commenced an action contesting the validity of certain inter vivos transfers to KMF. A temporary injunction had been entered in this latter action. Because of the pendency of these two suits at the time of the 1964 hearing, the trial court, with the parties' consent, appended an interlocutory order to the agreed judgment which prohibited transfer of the properties KMF had agreed to share with SKEF until the suits were resolved.

Petitioner's first objection

It was not until almost two years after entry of the agreed judgment (and three years after signing the settlement agreement) that Gregory asserted, for the first time in any judicial proceeding, that his consents to the settlement and judgment were not binding on him and that he wished to "withdraw" them. He first did so by a separate proceeding brought in 1966 and dismissed in 1967 on procedural grounds (*see* A-38-47), following which he made a motion to set aside the judgment in this case. During the next eleven years, he took no steps whatever to prosecute that motion.

Implementation of the agreed judgment

By mid-1978, the will contest had been resolved either by settlement or by dismissal of some of the contestants' claims and the exhaustion of all appeals. The related case was dismissed in September 1978. Thus, the contingencies that gave rise to the interlocutory injunctive provision holding up implementation of the otherwise final judgment of 1964 were removed.

These respondents moved in July 1979 for dismissal of petitioner's motion and entry of final judgment. They contended, among other things, that petitioner had no right to withdraw his consent to the judgment years after the event,

and had not met his duty of due diligence but had failed to prosecute his motion for over a decade to the prejudice of the other parties. On September 13, 1979, eight days before the hearing date, petitioner filed an amended motion to set aside the judgment asserting as his primary ground that he "no longer consents or agrees" to the settlement. In that document he demanded for the first time a jury trial on his motion. In addition to other infirmities, that request was untimely under Texas rules of procedure which require that a jury demand be filed not less than ten days in advance of the hearing. Tex.R.Civ.P. 216.

At the hearing, which was held on September 21, 1979, petitioner's counsel did not press his untimely jury demand. The district court heard testimony from a former assistant attorney general of Texas, two members of the law firm of Baker & Botts (petitioner's counsel of record at the time of the settlement and the 1964 judgment) and counsel representing KMF and the East estate. Each of these witnesses had participated in the settlement negotiations and the 1964 hearing, and each testified that at no time prior to the trial court's 1964 judgment approving the settlement, and dismissing all claims asserted herein with prejudice, did Gregory ever express the slightest reservation concerning the settlement.

Petitioner also testified at the hearing. He admitted that he signed the settlement agreement and the judgment and did not dispute any of the prior testimony concerning his failure to inform the other parties, his own counsel or the court of any mental reservation or condition to his consent (A-36).

On November 28, 1979, the district court dismissed Gregory's motion to vacate the 1964 judgment, dissolved the interlocutory provisions thereof, and "reaffirmed" and "made final" said judgment "in all other respects" (A-25). Since no federal question had been raised up to this point in the proceedings, the district court did not rule on any such issue.

Appellate review

The Texas Court of Civil Appeals affirmed the judgment of the district court, stating in part:

> "[I]n 1963 a settlement agreement was entered into by the parties. The appellant signed this agreement both in his individual and religious capacities. Although the interlocutory judgment incorporating this agreement was not rendered for more than a year after the settlement agreement was executed, neither the appellant's attorneys, the attorneys for the appellee, the trial judge, nor any of the other parties to the suit, knew of the conditional nature of his consent until several months after the judgment was rendered.
>
> "The appellant's attorneys negotiated a settlement in his behalf and were in possession of a settlement agreement and proposed judgment, which, on their face, were unconditionally executed and assented to by the appellant. We hold that Baker & Botts was authorized to seek a judgment entered in accordance with the settlement agreement, and that the appellant's failure to communicate to his attorneys, the appellees' attorneys, the trial judge, or any of the other parties, the conditional nature of his consent before the judgment was rendered, precludes him from denying this authority. *See Allsman* v. *Robinson*, 25 S.W.2d 237, 239 (Tex.Civ.App.—El Paso 1930, no writ).
>
> "For the reasons stated above we overrule the appellant's points of error and affirm the judgment of the trial court." (A-37)*

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* Although these findings should be conclusive for purposes of this petition, Gregory here contends that his consent was revoked prior to the 1964 hearing (Pet., p. 5) and cites a letter dated June 5, 1964 (A-50). Gregory admitted in his testimony at the district court hearing that, on his instructions to his unannounced attorney (Joyce), this letter was not sent until six months after its date, when it was attached to Joyce's December 9, 1964 letter (A-51). Messrs. Oden and Moody, the addressees of the letters set forth at A-51 and

Petitioner's application for writ of error was refused by the Supreme Court of Texas (with the notation "no reversible error") as was his motion for rehearing thereon (A-47-48). Neither of the Texas appellate courts which were asked to review the judgment in this action found it necessary to consider any federal question. Similarly notable is the absence of any reference to a federal question in the dissenting opinion in the court of civil appeals (A-37-39).

Reasons for Denying the Writ

I.

NEITHER THE DECISIONS BELOW NOR THE RECORD RAISES THE QUESTIONS PRESENTED IN THE PETITION.

This case was presented to the Texas courts on the issue of whether petitioner had the right to revoke his consent to a settlement which was considered and approved by the district court some fifteen years earlier. The Texas courts, applying Texas law, held that he could not. Apparently aware that the matters raised and resolved in Texas present no conceivable federal questions, Gregory here concocts arguments which, however interesting in a hypothetical sense, are simply unsupported by the facts and unrelated to the proceedings below.

Ignoring the facts as found by the courts below, petitioner boldly asserts that the 1964 judgment was "necessarily based solely on Keating's asserted ecclesiastical right to act on behalf of Gregory" (Pet., p. 9).* Petitioner further states that "on September 1, 1964, the judge in the trial court below accepted

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A-52, both testified that they first saw the "June" letter (A-50) in December, three months *after* judgment was entered. This was their first knowledge that Gregory wished to withdraw his consent.

* Rev. Thomas A. Keating was petitioner's abbot or religious superior when Gregory was associated with a Trappist monastery.

a written power of attorney as binding on Gregory, and entered judgment pursuant to that power of attorney" (Pet., p. 8). This wholly incorrect assumption is then used as a launching pad for the fantasy that the "south Texas courts" were unduly impressed by "ecclesiastical rules" in violation of the Establishment Clause (Pet. Question 1).

The first reference to a "power of attorney" (actually two telegrams (A-48, A-49) from Gregory's religious superior and a letter from petitioner to that superior) in this case was made by Gregory's attorney during his cross-examination in the 1979 hearing on respondent's motion for the entry of a final judgment. Those documents were not presented to, or "accepted" by (and so could not possibly have influenced), the trial judge at the 1964 hearing. Thus petitioner's present claim that the Texas court felt compelled "to adhere to a religious belief" is nothing more than a belated attempt to fashion a constitutional argument out of whole cloth.

Petitioner argues that the courts below must have accepted the "power of attorney" based on an "ecclesiastical right" of the abbot to give it because "there was no evidence before the court of civil authority or agency" (Pet., p. 14). In fact, there was no assertion of ecclesiastical authority by respondents nor any acceptance thereof by the courts in either 1964, when judgment was entered, or at the 1979 hearing when these documents were first presented to the trial court. On the other hand there was abundant evidence that Gregory (individually and as a religious) had authorized the settlement and judgment.

Robert Jewett, Esq. of Baker & Botts, who represented Gregory in 1964, testified at the 1979 hearing that the documents signed by Gregory recited in detail all of the steps that were to be taken in open court, and that he had every reason to believe that he was authorized to act for Gregory in taking them. He based this on Gregory's unconditional written consent to the settlement and judgment, both in his individual and religious capacities, as well as on subsequent conversations

with his client. Jewett viewed his communications from the abbot (who was not a party to these proceedings) merely as further confirmation of his authority to take the corporate steps that were agreed to in the settlement.* On cross-examination by Gregory's attorney in 1979, Jewett was asked if he considered those documents as constituting a power of attorney, and he said that he did. In response to further questioning by Gregory's counsel, Jewett stated that he was not familiar with the authority exercised by an abbot over a monk in a monastic order. At no time did respondents assert that Keating had ecclesiastical authority to act for Gregory and the courts below simply had no occasion to consider the questions of church-state accomodations which Gregory would now raise.

II.

THE DECISIONS BELOW ADEQUATELY DISPOSE OF THE ISSUES HEREIN ON THE BASIS OF STATE LAW AND RAISE NO FEDERAL QUESTION.

After consenting to the 1964 judgment, Gregory moved to set it aside in 1968 but took no action over the next eleven years to prosecute his motion. When the dismissal of related cases made it appropriate for respondents to move for final judgment and vacatur of the interlocutory order preventing

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* The two telegrams appear at A-48, A-49. The other document introduced was a copy of a July 9, 1964 letter from petitioner to Abbot Keating which reads in pertinent part as follows:

> "Reverend Father: Aware that what I am today signing may be at any time used by the person to whom it is addressed in any manner that he in conscience may see fit, I wish to make the following carefully worded but unequivocal statement. . . .
>
> "In the present situation I accept the decision of events in the light of the above, without condition and thus I shall initiate no further action whatsoever concerning the Kenedy Memorial Foundation. The word 'initiate' does not preclude my cooperating in such actions as my superiors may judge to be necessary for the finalizing of the settlement already agreed upon." (Exhibit 3 in evidence).

final implementation of the settlement, Gregory asserted that he "no longer consents" to the settlement. The Texas Court of Civil Appeals held, as a matter of Texas law, that a party may not undo his previously granted consent so late in the judicial day. Such a decision is plainly within the power of a Texas court and, in fact, constitutes the entire basis for the decision below.

We have already noted that there is no First Amendment issue here because there was no reliance by the Texas courts on "ecclesiastical rules". Moreover, petitioner's efforts to find violations of the Fourteenth Amendment in the proceedings below are factually unfounded and constitute an attempt to revive an issue which was disposed of on adequate and independent state grounds. Petitioner now asserts that he was not given the opportunity to be heard with respect to his consent to the settlement "prior to the entry of the initial judgment on September 1, 1964" (when he did not ask to be heard) and that "in 1979, Gregory was again denied the right to a trial on the issue of his consent *at that time* to the settlement" (Pet., p. 17, emphasis supplied).

The 1964 proceeding was a hearing at which the court approved a settlement on the basis of the signed consents of all parties to the judgment entered dismissing all claims herein.* Petitioner later testified that he had secretly consulted counsel other than his attorneys of record in June of 1964. He never asserted, however, that prior to the entry of the 1964 judgment he informed (and the Texas courts found that he did not inform) his attorneys of record, the trial court, or any of the other parties to this proceeding or their attorneys of record, that he wished to be heard or that he had any reservations concerning his consent. To assert now that he was denied a hearing in 1964 (never having made such an argument to the

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* Gregory's signature on both documents signified that he was "Acting Individually and as a Religious of the Cistercian Order of the Strict Observance Under Valid Authority of His Lawful Religious Superior" (A-8). This did not go unnoticed by the court of civil appeals (A-37).

Texas courts) is specious, at best, and surely the sort of factual issue which does not lend itself to review by this Court.

In 1979, when Gregory sought to renege on the settlement and "withdraw" his consent, he had an evidentiary hearing at which he testified and was represented by counsel whose proof was in no way restricted or limited by the trial court. Petitioner now suggests that he was entitled to a jury trial (which he had earlier waived in the settlement agreement and agreed judgment, A-2) on a motion dealing with an issue which was equitable in nature (*i.e.*, whether he could rescind a consent given sixteen years earlier) despite the fact that his jury demand was untimely under the Texas Rules of Civil Procedure. As noted above, this issue was not properly raised at the trial court level. Thereafter, although the Texas appellate courts were given the opportunity to review the question of Gregory's right to a jury trial, neither of them considered it necessary to reach the question.

Thus petitioner has failed to preserve the questions he now asks this Court to consider, failed to proceed as Texas rules of procedure dictate, and failed to persuade the courts below of the merit of his position. Now, he asks this Court, in effect, to review the findings of fact made by the Texas courts which persuaded them (wholly as a matter of Texas law, and without reference to any federal question) that he could not withdraw his consent to the agreed judgment. That, we submit, is an exercise unworthy of this Court's attention.

CONCLUSION

The petition should be denied.

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